# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 2 |
| Question presented | 2 |
| Statute involved | 2 |
| Statement | 6 |
| Argument | 9 |
| Conclusion | 13 |


## CITATIONS


Cases:

| | |
|---|---|
| *Columbia Cheese Co.* v. *McNutt*, 137 F. 2d 576, certiorari denied, 321 U.S. 777 | 11 |
| *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197 | 12 |
| *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U.S. 218 | 10, 11 |

Statute and regulations:

| | |
|---|---|
| Federal Food, Drug and Cosmetic Act, 52 Stat. 1040, as amended, 21 U.S.C. 301, *et seq.*: | |
| Sec. 401 (21 U.S.C. 341) | 2 |
| Sec. 701 (21 U.S.C. 371) | 2 |
| 21 CFR 2.90-2.91 | 6 |
| 21 CFR 19.580 | 12 |
| 21 CFR 19.585 | 12 |
| 21 CFR 19.600 | 7 |
| 21 CFR 19.601 | 6 |
| 21 CFR 19.605 | 7 |
| 21 CFR 19.606 | 6 |
| 22 F.R. 428 | 7 |
| 26 F.R. 6599 | 7 |
| 29 F.R. 18121 | 6 |

# In the Supreme Court of the United States

OCTOBER TERM, 1966

---

No. 246

BRUNETTO CHEESE MANUFACTURING CORP., C. & F. CHEESE DISTRIBUTORS, INC., FALCONE DAIRY PRODUCTS, INC., J. J. GIAMMALVO, INC., M. MAGGIO CO., POLLIO DAIRY PRODUCTS CORP., SORRENTO CHEESE COMPANY, INC., SUNBURY CHEESE COMPANY, INC., AND ITALIAN FRESH CHEESE MANUFACTURERS ASSOCIATION, INC., PETITIONERS

*v.*

JOHN W. GARDNER, SECRETARY OF HEALTH, EDUCATION AND WELFARE OF THE UNITED STATES

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

## BRIEF FOR RESPONDENT IN OPPOSITION

---

### OPINION BELOW

The opinion of the court of appeals (Pet. App. 25-28) is reported at 356 F. 2d 874.

## JURISDICTION

The judgment of the court of appeals was filed on February 4, 1966. A petition for rehearing was denied on March 23, 1966. The petition for a writ of certiorari was filed on June 17, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

## QUESTION PRESENTED

Whether regulations issued under the Federal Food, Drug and Cosmetic Act, Section 401, establishing definitions and standards of identity for mozzarella cheese (21 CFR 19.600) and low-moisture mozzarella cheese (21 CFR 19.605) are adequately supported by substantial evidence of record.

## STATUTE INVOLVED

The Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040, as amended, 21 U.S.C. 301, *et seq.*, provides in pertinent part:

Section 401 (21 U.S.C. 341)

> Whenever in the judgment of the Secretary such action will promote honesty and fair dealing in the interest of consumers, he shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity, a reasonable standard of quality, and/or reasonable standards of fill of container: * * *.

Section 701 (21 U.S.C. 371).

(e)(1) Any action for the issuance, amendment, or repeal of any regulation under section 401, 403(j), 404(a), 406, 501(b), or 502(d) or (h) of this Act shall be begun by a proposal made (A) by the Secretary on his own initiative, or (B) by petition of any interested person, showing reasonable grounds therefor, filed with the Secretary. The Secretary shall publish such proposal and shall afford all interested persons an opportunity to present their views thereon, orally or in writing. As soon as practicable thereafter, the Secretary shall by order act upon such proposal and shall make such order public. Except as provided in paragraph (2), the order shall become effective at such time as may be specified therein, but not prior to the day following the last day on which objections may be filed under such paragraph.

(2) On or before the thirtieth day after the date on which an order entered under paragraph (1) is made public, any person who will be adversely affected by such order if placed in effect may file objections thereto with the Secretary, specifying with particularity the provisions of the order deemed objectionable, stating the grounds therefor, and requesting a public hearing upon such objections. Until final action upon such objections is taken by the Secretary under paragraph (3), the filing of such objections shall operate to stay the effectiveness of those provisions of the order to which the objections are made. As soon as practicable after the time for filing objections has expired the Secretary shall publish a notice in the Federal Register specifying those parts of the order

which have been stayed by the filing of objections and, if no objections have been filed, stating that fact.

(3) As soon as practicable after such request for a public hearing, the Secretary, after due notice, shall hold such a public hearing for the purpose of receiving evidence relevant and material to the issues raised by such objections. At the hearing, any interested person may be heard in person or by representative. As soon as practicable after completion of the hearing, the Secretary shall by order act upon such objections and make such order public. Such order shall be based only on substantial evidence of record at such hearing and shall set forth, as part of the order, detailed findings of fact on which the order is based. The Secretary shall specify in the order the date on which it shall take effect, except that it shall not be made to take effect prior to the ninetieth day after its publication unless the Secretary finds that emergency conditions exist necessitating an earlier effective date, in which event the Secretary shall specify in the order his findings as to such conditions.

(f) (1) In a case of actual controversy as to the validity of any order under subsection (e), any person who will be adversely affected by such order if placed in effect may at any time prior to the ninetieth day after such order is issued file a petition with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such order. A copy of the petition shall be forthwith transmitted by the clerk of the court of the Secretary or other officer designated by him for that purpose. The

Secretary thereupon shall file in the court the record of the proceedings on which the Secretary based his order, as provided in section 2112 of title 28, United States Code.

(2) If the petitioner applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Secretary, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Secretary, and to be adduced upon the hearing, in such manner and upon such terms and conditions as to the court may seem proper. The Secretary may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken, and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original order, with the return of such additional evidence.

(3) Upon the filing of the petition referred to in paragraph (1) of this subsection, the court shall have jurisdiction to affirm the order, or to set it aside in whole or in part, temporarily or permanently. If the order of the Secretary refuses to issue, amend, or repeal a regulation and such order is not in accordance with law the court shall by its judgment order the Secretary to take action with respect to such regulation, in accordance with law. The findings of the Secretary as to the facts, if supported by substantial evidence, shall be conclusive.

(4) The judgment of the court affirming or setting aside, in whole or in part, any such or-

der of the Secretary shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended.

(5) Any action instituted under this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

(6) The remedies provided for in this subsection shall be in addition to and not in substitution for any other remedies provided by law.

* * * *

## STATEMENT

1. Petitioners seek review of the judgment of the Court of Appeals for the Second Circuit sustaining an order by the Deputy Commissioner of Food and Drugs (29 F.R. 18121, Pet. 28-41)[1] establishing, by separate regulations, standards for "mozzarella cheese" and "low-moisture mozzarella cheese."[2] By

---

[1] Authority vested in respondent, the Secretary of Health, Education, and Welfare, under the Act is delegated to the Commissioner of Food and Drugs; the Deputy Commissioner of Food and Drugs is redelegated the authority to perform all of the functions of the Commissioner. 21 CFR 2.90-2.91. Thus, all actions taken in this proceeding either by the Commissioner or Deputy Commissioner of Food and Drugs were pursuant to authority conferred by the Secretary.

[2] The order also establishes standards for part-skim mozzarella cheese (21 CFR 19.601) and part-skim low moisture mozzarella cheese (21 CFR 19.606). The part-skim products conform to the standards in question, except that the milk-fat content is less.

Regulation 19.600, the so-called "eastern" type cheese, as made by petitioners, is to be called "mozzarella cheese" and is required to contain between 52 percent and 60 percent moisture. Another product, the so-called "midwestern" type cheese, pursuant to Regulation 19.605, is to be called "low-moisture mozzarella cheese" and is required to contain between 45 percent to 52 percent moisture.

The proceedings were initiated in 1957 by a petition by the National Cheese Institute seeking the establishment of a definition and standard of identity for mozzarella cheese, which was initially denied (22 F.R. 428, January 23, 1957; Ex. 1). After public hearings in 1958, tentative findings of fact and a tentative order were published in the Federal Register on July 22, 1961 (26 F.R. 6599; Pet. App. 41-46), establishing definitions and standards of identity for the two types as "mozzarella cheese" and "pizza cheese". Firms, individuals, and associations filed exceptions. After consideration of the exceptions, the final order was published in the Federal Register of December 22, 1964.

2. The evidence on which the Regulations were based may be summarized as follows:

There are two types of cheese which have been manufactured, distributed, and purchased by consumers in the United States under the name, "mozzarella" (Findings 8, 10; Pet. App. 34-35, 36-37). These are referred to in the trade as the "eastern" and "midwestern" types (Findings 2, 8; Pet. App. 31, 35).

The "eastern" type, manufactured and distributed by petitioners, was developed to fill the demand created by Italian immigrants settling in eastern cities (R. 16a). This cheese was made in the United States as early as 1900 (R. 16a; Finding 2; Pet. 30). The manufacturing procedures followed in general those that had been developed for the manufacture of mozzarella in Italy (Finding 2; Pet. 30). This "eastern" mozzarella contains moisture in the range of from 52 to 60 percent (Finding 4; Pet. App. 32). Due to this high moisture content, its shelf-life is at most a month (R. 169b-170b, 172b), and it is distributed mainly in eastern cities, rather than nationwide (R. 69b, 70b; Findings 2, 8, 10; Pet. App. 30-31, 34, 36).

The "midwestern" type was developed before World War II and was originally called "Scamorza" (R. 11b, 12b)[3] or "Mozzarella" (R. 123b). The great volume of manufacture and distribution of the "midwestern" type developed after World War II to fill the nationwide demand for mozzarella created by the widespread post-war popularity of "pizza." Mozzarella was one of the ingredients generally recommended in recipe books for pizza (R. 119b). The "midwestern" cheese, since the advent of pizza and the pizzarias, has been labeled, sold, and accepted by consumers as mozzarella (*e.g.*, R. 12b, 83b, 149b, 88a, 90a; Findings 8, 10; Pet. App. 34-35, 36). The "midwestern" mozzarella contains moisture between

---

[3] All at the hearing agreed that scamorza is a certain shape of mozzarella cheese; all scamorza is mozarella, but not all mozzarella is scamorza (see, *e.g.*, R. 128a-129a, 15a, 118b).

45 percent and 52 percent (R. 13b, 99b, 100b, 107b-108b, 144b; Finding 9; Pet. 35). Due to this lower moisture content, it has a far longer shelf-life (R. 131b-132b, 158b-159b), and is distributed nationwide (Findings 8, 10; Pet. 35, 37; R. 88a, 90a, 12b, 22b, 68b, 70b, 74b-76b, 83b-84b, 102b, 106b-108b, 111b, 115b, 116b, 119b-120b, 125b, 128b, 136b, 144b-145b, 149b).

Based upon this evidence, the Commissioner established two separate standards for the two separate products which were known to the public as mozzarella cheese. The Commissioner found that the significant difference between the two products was their moisture content (Finding 10; Pet. 37) and, accordingly, established standards for "mozzarella cheese" and "low-moisture mozzarella cheese."

## ARGUMENT

1. It is not disputed that the eastern and midwestern types of cheeses here involved are different and should be separately classified. Petitioners' argument is that only the eastern type, which they manufacture, is genuine mozzarella,[4] and that the

---

[4] Petitioners' assertion that their cheese is the "genuine" product (Pet. 11) is not entirely correct. A good many changes have been made from the original methods used in Italy, such as the use of cow's milk instead of water buffalo milk; pasteurization of milk; refrigeration of curd; addition of starter; use of mechanical equipment; use of partly-skimmed milk for some grades; and the change from paste rennet to liquid rennet because of flavor problems (R. 159b, 161b-166b). The "genuine" product, a very high moisture cheese (approxi-

midwestern product ought not be allowed to use the term mozzarella at all. They contend that since the midwestern type has never been called low-moisture mozzarella, it has not been standarized under its common or usual name so far as practicable, as required by the statute.

Their argument overlooks the fact that the evidence showed, and the Deputy Commissioner found, that the midwestern product was "generally represented to be and labeled as 'mozzarella'" (Pet. App. 36). The authority of the Secretary under Section 401 of the Federal Food, Drug, and Cosmetic Act is not, as petitioners assume, limited to gathering information as to the historical composition of foods and incorporating only that information into standards for their identity. His function is to establish standards which will promote honesty and fair dealing in the interest of consumers. Such standards by their very nature include some products and exclude others, or exclude or limit some ingredients that may be in commercial use. The American public's interest is in the establishment of "standards of identity of a food, sold under a common or usual name, so as to give to consumers who purchase it under that name assurance that they will get what they may reasonably expect to receive" (*Federal Security Administrator* v. *Quaker Oats Co.*, 318 U.S. 218, 228-232). The Federal Food, Drug, and Cosmetic Act does not restrict this concept to the interest of any particular

---

mately 65 percent moisture) sold out of water, is not affected by the standard since it is suitable only for local sales (R. 64b).

section or segment of the country. Petitioners' contentions have as their foundation the fundamentally fallacious argument that only the Eastern consumer —and, particularly, the Italian community in New York State—has an interest in this matter. As the Court below pointed out, "the consuming public was not confined to the east." (Pet. App. 27). The Commissioner could properly authorize a standard which defined for the country as a whole the product commonly known, purchased, and accepted as mozzarella cheese. The name "low-moisture mozzarella" is an appropriate and reasonable designation for the midwestern product which has been sold throughout the nation as mozzarella cheese but which is in some measure distinguishable from the mozzarella cheese as it has been made for a longer time in the eastern states.

The name "mozzarella" was retained for the soft, high moisture type of cheese which had long been familiar to the Italian-American customer. The low-moisture name advised the consumer of the essential difference between the two types. Since the name chosen has a rational basis and is consistent with the statutory purpose of promoting honesty and fair dealing in the interest of consumers the court below properly declined to substitute its judgment for that of the Commissioner. *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U.S. 218. The fact that the Commissioner might also properly have chosen another name for the low-moisture mozzarella (cf. *Columbia Cheese Co.* v. *McNutt*, 137 F.2d 576 (C.A. 2, certiorari denied, 321 U.S. 777, cited by petitioners

at Pet. 17) is of no significance so long as the name he did choose is appropriate.[5]

Petitioners' contention that the standard must fall because of an asserted conflict with the standard for mozzarella cheese promulgated by New York State (Pet. 13-14) is without merit.[6] State enactments cannot override federal regulations promulgated under constitutional authority. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197.[7]

---

[5] Petitioners imply that this is the only standard in which the name of the cheese is couched in terms of moisture. Another example of differentiation between types of cheeses in terms of moisture are the standards for "monterey cheese," "monterey jack cheese" (21 CFR 19.580) and "high moisture jack cheese" (21 CFR 19.585).

[6] Equally irrelevant is the fact that the standard accords with the mozzarella-cheese standard promulgated by the State of California (Pet. 5).

[7] It does not appear to us that the practical problems in New York are as great as petitioners would make them appear. If the low-moisture cheese is labelled "low-moisture mozzarella—pizza cheese" it would seem to meet both New York and federal standards. In all events, petitioners can hardly complain that the manufacturers of the midwestern type cheese might be excluded from the New York market.

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
*Solicitor General.*

FRED M. VINSON, JR.,
*Assistant Attorney General.*

BEATRICE ROSENBERG,
*Attorney.*

*Of Counsel:*

WILLIAM W. GOODRICH,
*Assistant General Counsel,*

JOANNE S. SISK,
*Attorney,*
*Department of Health, Education & Welfare.*

AUGUST 1966

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 227026 99